

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	WC Docket No. 17-108
)	
Restoring Internet Freedom)	

COMMENTS OF TRACFONE WIRELESS, INC.

Mitchell F. Brecher
GREENBERG TRAURIG, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037
(202) 331-3100

Its Attorneys

July 17, 2017

TABLE OF CONTENTS

SUMMARY	i
I. Introduction and Statement of Interest.....	1
II. The Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Provides Ample Legal Basis for Universal Service Fund Support of Broadband Internet Access Service Without Regard to its Classification.....	3
III. In Order to Achieve the Statutory Universal Service Goals, Broadband Internet Access Service Must Be Affordable.	9
CONCLUSION.....	12

SUMMARY

The Commission has broad authority under the Communications Act and indeed the responsibility to direct that the Universal Service Fund (USF) support affordable broadband Internet access service (BIAS) for low-income households through the Lifeline program without regard to whether BIAS remains classified as a telecommunications service subject to Title II of the Act or is reclassified as an information service subject only to Title I of the Act. That authority derives from Section 254 of the Act as well as the Preamble to the Telecommunications Act of 1996 and the legislative history of the 1996 Act. BIAS meets all four prongs of the Section 254(c) test for the evolving level of universal service to be established by the Commission: it is essential to public education, public health and public safety; it is subscribed to by a substantial majority of residential customers; it is deployed in virtually all public telecommunications networks; and inclusion of BIAS as part of universal service is consistent with the public interest. The inclusion of the all-important words “including low-income consumers” in Section 254(b)(3) further demonstrates Congress’s intent that the USF support affordable BIAS for low-income households through Lifeline.

Importantly, BIAS is an access service, *i.e.*, it provides access to advanced services and information services. As an access service, it is subject to USF subsidization without regard to whether the services which it accesses are themselves telecommunications services. Prior Commission decisions involving high cost support for broadband loops and support for Internet access through the School and Libraries program further demonstrate the scope of the Commission’s authority to support broadband through the USF. Section 706 of the 1996 Act provides an additional basis for such support.

In order for USF support for BIAS to be meaningful, the supported service must be affordable to those low-income households the Lifeline program is intended to reach. Unless revised, the mobile broadband minimum service standards established by the Commission, though well-intentioned, will result in BIAS rates which, even after the Lifeline subsidy, will be far beyond the means of most low-income households. Establishment of broadband minimum standards which result in service which most low-income households are unable to afford will impede the Commission's efforts to bridge the digital divide.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	WC Docket No. 17-108
)	
Restoring Internet Freedom)	

COMMENTS OF TRACFONE WIRELESS, INC.

TracFone Wireless, Inc. (“TracFone”), by its attorneys, hereby submits its comments in response to the notice of proposed rulemaking issued in this proceeding,¹ and states as follows:

I. Introduction and Statement of Interest.

In the Notice, the Commission has proposed to revisit its 2015 decision to reclassify broadband Internet access service (“BIAS”) as a telecommunications service subject to Title II of the Communications Act (“Act”),² and to reinstate its prior classification of broadband³ as an information service subject only to Title I of the Communications Act. It also proposes to rescind the general conduct standard and to re-evaluate certain of the rules promulgated in 2015 governing broadband Internet access.⁴ TracFone’s comments address one issue, albeit a critically important issue: whether the Commission may continue to utilize federal Universal Service Fund (“USF”) resources through the federal Lifeline program to support affordable broadband Internet access service to low-income households. As will be described in these comments, the Act affords the Commission abundant authority to require the use of USF

¹ Restoring Internet Freedom (*Notice of Proposed Rulemaking*), FCC 17-60, released May 23, 2017 (“NPRM” or “Notice”).

² Protecting the Open Internet (*Report and Order on Remand, Declaratory Ruling and Order*), 30 FCC Rcd 5601 (2015), *aff’d sub nom. United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

³ As used in these comments, the term “broadband” refers to broadband Internet access service.

⁴ Specifically, the NPRM seeks comment on the continuing need for the rules prohibiting blocking of Internet content and throttling of Internet access speeds, the rule prohibiting paid prioritization, and the rule requiring transparency. NPRM at ¶¶ 71-91.

resources to support BIAS. Moreover, the Commission's public interest responsibilities compel that it not retreat from the Commission's 2016 modernization of the Lifeline program to support broadband in addition to supporting voice telephone service.

TracFone is the nation's leading provider of Lifeline service. It has been designated as an Eligible Telecommunications Carrier ("ETC"), either by the Commission pursuant to Section 214(e)(6) of the Act,⁵ or by State commissions pursuant to Section 214(e)(2) of the Act⁶ to provide Lifeline service in more than 40 states. Currently, it provides Lifeline service to approximately four million Lifeline-eligible low-income households throughout those states. Through its SafeLink Wireless[®] Lifeline service, TracFone has pioneered wireless Lifeline and has introduced such important and consumer-beneficial innovations as no charge all distance calling service; provision of wireless devices at no charge to qualified Lifeline consumers; unlimited text messaging; and enhanced healthcare-related services provided in conjunction with various health maintenance organizations ("HMOs") throughout the nation. Commencing in December 2016, TracFone modernized its Lifeline service to include mobile broadband Internet access in accordance with the Commission's 2016 Lifeline Modernization Order and the service standards established in that order.⁷ TracFone Lifeline consumers now receive 500 MB of mobile broadband Internet access service per month as well as Wi-Fi-enabled smartphone devices.

⁵ 47 U.S.C. § 214(e)(6).

⁶ 47 U.S.C. § 214(e)(2).

⁷ Lifeline and Link Up Reform and Modernization, et al. (Third Report and Order, Further Report and Order, and Order on Reconsideration), 31 FCC Rcd 3962 (2016) ("Lifeline Modernization Order").

Affordable BIAS is critical to the ability to participate in the 21st Century economy – a view shared by current Commission leadership, including Chairman Pai.⁸ For that reason, TracFone supported the Commission’s 2015 proposal to modernize Lifeline to support broadband as the Commission elected to do in the 2016 Lifeline Modernization Order. Indeed, the Commission requirement that ETCs who provide wireless devices as part of their Lifeline programs, provide devices which are Wi-Fi-enabled was initially proposed by TracFone.⁹ By modernizing Lifeline to support broadband as well as voice telecommunications service, the Commission took an important step toward making Internet access available to low-income Americans and, by doing so, bridging the digital divide. As will be further explained in these comments, the Commission enjoys broad authority to require Lifeline to support broadband service without regard to how the service is classified and without regard to whether it is subject to Title I or Title II.

II. The Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Provides Ample Legal Basis for Universal Service Fund Support of Broadband Internet Access Service Without Regard to its Classification.

In 1996, the Telecommunications Act of 1996 (Pub. L. 104-104, 110 Stat. 56) was enacted into law. The 1996 Act amended the Communications Act in significant respects. Importantly, the 1996 Act established competition in all telecommunications markets as the national policy, and codified an expanded policy of universal service into statutory law. The underlying purposes of the 1996 Act are set forth in that Act’s Preamble:

⁸ Statement of FCC Chairman Ajit Pai on the Future of Broadband in the Lifeline Program, March 29, 2017 (“I support including broadband in the Lifeline program to help provide affordable, high-speed Internet access for our nation’s poorest families.... I want to make it clear that broadband will remain in the Lifeline program so long as I have the privilege of serving as Chairman.”).

⁹ Lifeline Modernization Order, ¶ 374.

AN ACT To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and **encourage the rapid deployment of new telecommunications technologies**. (emphasis added)

As TracFone described in a May 10, 2017 ex parte letter, those highlighted words from the Preamble are central to understanding the purposes and goals of the 1996 Act.¹⁰ There can be no more effective way to encourage and hasten the deployment of new technologies (and services using those technologies) than to expand the base of consumers of services who use those technologies. Few, if any, new technologies have had a more profound impact on consumers than Internet Protocol services – services which are dependent upon the availability of broadband. Making available to low-income households affordable broadband service (to whom broadband service historically has not been affordable) will materially increase the universe of broadband service users which will, in turn, hasten the deployment of new technologies and new broadband Internet-based services.

The statement of purpose contained in the Preamble is only the starting point for analysis. Indeed, the statutory language itself as amplified by the 1996 Act's legislative history provide further justification for USF support of broadband service through the Lifeline program. Section 254 of the Communications Act (added to the Act by the 1996 Telecommunications Act) defines universal service as an “evolving level of telecommunications services that the Commission shall establish periodically . . . taking into account advances in telecommunications and information technologies and services.”¹¹ Under Section 254(c), the Commission is not directed to establish those evolving levels of universal service in a vacuum. Rather, it is to be guided by four

¹⁰ Letter from Mitchell F. Brecher, counsel for TracFone, to Marlene H. Dortch, Secretary, filed in WC Docket No. 17-108, May 10, 2017.

¹¹ 47 U.S.C. § 254(c)(1).

specifically-articulated factors. The Commission must determine whether such evolving services:

- 1) are essential to education, public health, or public safety;
- 2) have, through operation of market choices by customers, being subscribed to by a substantial majority of residential customers;
- 3) are being deployed in public telecommunications networks by telecommunications carriers; and
- 4) are consistent with the public interest, convenience, and necessity.

Broadband meets each of these four factors. Consumers use broadband service for educational purposes (including, for example, to conduct research and complete homework assignments, and to attend college and graduate schools online). Consumers also use broadband to access health services and exchange information with health care providers. TracFone's partnerships with HMOs are excellent examples of how broadband can achieve improved health outcomes. TracFone uses HMO databases of enrolled Medicaid members to verify applicants' Lifeline eligibility. Those customers receive, in addition to the standard Lifeline benefits, unlimited access to their healthcare providers, appointment reminders and other health messages, and a series of health-focused text messaging services.

Neither is there any doubt that today a very substantial majority of consumers subscribe to wireline or wireless broadband service. In fact, many households utilize wireline and wireless broadband services. With respect to the third factor, broadband services are being deployed in public telecommunications networks. Virtually every wireline telephone company, every wireless provider, and every cable operator has invested in infrastructure to facilitate the offering of broadband services to consumers. Finally, given the increasing reliance on broadband Internet access to communicate, to access information, to pursue employment opportunities and for healthcare, as well as for entertainment and education, there can be no serious debate that access

to affordable broadband by all households, including low-income households, will serve the public interest, convenience and necessity.

Section 254(b) of the Act contains a series of principles upon which the Commission is statutorily obligated to base its universal service policies. Among those principles is the following:

ACCESS TO ADVANCED SERVICES – Access to advanced telecommunications **and information services** should be provided in all regions of the nation.¹²

By explicitly including **access to** advanced telecommunications services and information services among those universal service principles, Congress articulated a clear intent to include such advanced services within the scope of universal service (and therefore appropriate to be supported by the federal USF) whether those advanced services are classified as telecommunications service or as information service at any point in time. In other words, what matters is that Congress intended for the Commission to be empowered to use Universal Service Fund resources to subsidize access to information service (including BIAS should it be so classified) within its universal service mandate.

¹² 47 U.S.C. § 254(b)(2) (emphasis added).

In this regard, the Commission's attention is directed to the Senate Report accompanying the 1996 Act.¹³ That report states as follows:

As defined under the 1934 Act (as amended by this bill), "telecommunications services" includes the transport of information or cable services, but not the offering of those services. This means that information or cable services are not included in the definition of universal service; what is included is that level of telecommunications services that the FCC determines should be provided at an affordable rate to allow all Americans **access** to information, cable, and advanced telecommunications services that are an increasing part of daily life in modern America.¹⁴

The key word in the preceding statement from the Senate Report is the word highlighted in the report: **access**. What is critical in determining the scope of permissible universal service funding is what services need to be supported in order to ensure affordable **access to** advanced and information services. By definition, broadband Internet *access* service includes that all-important element of access, *i.e.*, the ability of consumers to reach the Internet content of their choice.¹⁵ The conclusion is inescapable: the Commission has the statutory authority and the obligation under the universal service provisions of the Act to ensure that all Americans have affordable access to the Internet. Whether BIAS is classified as telecommunications service subject to Title II or as information service subject to Title I, access to advanced and information services is an essential aspect of universal service.

¹³ S. Rep. No. 23, 104th Congress, 1st Session ("Senate Report").

¹⁴ *Id.*, at 27 (emphasis original).

¹⁵ This all-important component of "access" is incorporated in the definition of broadband Internet access service promulgated by the Commission and codified in its rules. 47 C.F.R. § 54.400(1) defines broadband Internet access service as "a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up service." That "capability to transmit and to receive data from all or substantially all endpoints" is access.

Whether broadband Internet access service is subject to Title II (telecommunications service) or Title I (information service) is a question which has regulatory consequences. Title II services are subject to certain common carrier requirements, *e.g.*, just and reasonable, nondiscriminatory rates;¹⁶ Commission approval to acquire facilities or extend lines;¹⁷ duty to file schedules of rates (tariffs) in certain circumstances.¹⁸ Title I services are not subject to those common carrier requirements. However, those differences in applicable regulatory requirements are wholly irrelevant to whether broadband Internet access service – a service which provides high speed **access** to the Internet and to a myriad of Internet-based information services – may be supported by the USF. The answer to that question is an unequivocal yes.

Another important aspect of Section 254 is the inclusion of the words “including low-income consumers” in Section 254(b)(3). Those words are an essential component of the Commission’s legal predicate for establishment of the Lifeline program to bring about affordable service (including access to information service) for low-income consumers. Section 254(b)(3) of the Act provides that consumers, “including low-income consumers” should have access to affordable telecommunications and information services. A clearer expression of statutory direction to support affordable broadband access for low-income consumers, whether classified as telecommunications service or information service, cannot be imagined.

Inclusion of BIAS as a service supported by the USF is also consistent with Commission precedent. For example, in 2016, the Commission relied on its authority under Section 254 to extend high cost support to broadband-only loops without regard to whether those facilities are

¹⁶ 47 U.S.C. §§ 201(b), 202(a).

¹⁷ 47 U.S.C. § 214.

¹⁸ 47 U.S.C. § 203.

used for BIAS or voice services.¹⁹ In doing so, the Commission concluded that its action “advances the statutory goal of providing **access to** advanced telecommunications and information services in all regions of the Nation.”²⁰ Nearly two decades ago, the Commission approved use of USF resources to support Internet access as part of the schools and libraries program. That decision was affirmed by the United States Court of Appeals for the Fifth Circuit.²¹

Although not necessary to a conclusion that the Act affords ample authority to authorize USF resources to support broadband through the Lifeline program, Section 706 of the 1996 Act provides additional legal support for that conclusion. Indeed, in Verizon v. FCC, 740 F.3d. 623, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the Commission’s reliance on Section 706 to achieve the important statutory objective of accelerating deployment of advanced telecommunications capability – capability which includes broadband internet access.

III. In Order to Achieve the Statutory Universal Service Goals, Broadband Internet Access Service Must Be Affordable.

As described in the preceding section of these comments, the Act provides the Commission with broad authority and, indeed the responsibility, to include BIAS among the services to be supported through the USF’s Lifeline program. A related question of significance is how BIAS should be supported. In determining how to support such service and at what levels, the Commission should remain mindful of the importance of affordability as a universal service goal. Among the universal service principles identified by Congress was affordability.

¹⁹ Connect America Fund (*Report and Order and Order on Reconsideration and Further Notice of Proposed Rulemaking*), 31 FCC Rcd 3087 (2016).

²⁰ *Id.*, at ¶ 87 (emphasis added).

²¹ Texas Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999).

The Senate Report accompanying the 1996 Act states that “[t]he term ‘affordable’ is made in reference to what consumers are able and willing to pay for a particular service included in the definition of universal service.”²² As acknowledged by Chairman Pai in his March 29, 2017 statement, affordability is an especially significant universal service concept for low-income consumers. Subsidizing a service which, after the subsidy, remains priced at levels above what consumers are able and willing to pay will not advance universal service. A Lifeline program that conditions availability of broadband support on providing levels of service which, when offered at subsidized prices, is still above the means of low-income households, is antithetical to the statutory requirement codified at Section 254(b)(3) that low-income consumers have access to affordable services.

Unfortunately, this is more than a theoretical concern. In the 2016 Lifeline Modernization Order, the Commission promulgated minimum standards for voice and broadband Lifeline service. In the case of broadband, commencing December 2, 2016, the mobile broadband minimum standards was set at 500 MB per month at 3G speed. Although that is a substantial amount, TracFone and other wireless Lifeline providers have been able to provide that level of broadband service as they have historically provided their voice service – with no out-of-pocket charges to qualified Lifeline households. However, those minimum standards are progressive and are scheduled to increase each year. Beginning in December 2017, the minimum service level will jump to 1 GB per month. In December 2018, it will again rise to 2 GB per month. Beginning in 2019, the mobile broadband minimum standard will be set annually

²² Senate Report, at 26.

using a formula based on average household usage including households with multiple users and multiple devices.²³

Although these minimum standard increases will be substantial, there will be no corresponding increase in USF support. Monthly Lifeline support will remain capped at its current level of \$9.25 per month. Neither TracFone nor any other provider can deliver 2 GB or more of mobile broadband service with a \$9.25 monthly subsidy. That will force providers to charge their Lifeline customers the cost of 2 GB (or more starting in 2019) minus only the \$9.25 support amount. The result will be monthly broadband prices far beyond the means of millions of Lifeline-eligible low-income households.²⁴ Whether to adjust the broadband minimum standards is before the Commission in the reconsideration phase of the Lifeline Modernization proceeding. That said, TracFone believes that this proceeding is also an appropriate opportunity for the Commission not only to affirm its legally correct conclusion that it enjoys the authority to include broadband Internet access service as part of the Lifeline program supported by the USF, but also for the Commission to further consider the importance of affordability of broadband service to low-income households in achieving the universal service goals established in the Act.

²³ 47 C.F.R. § 54.408(b)(2). The minimum standard for 2019 and beyond will be based on 70 percent of average household usage, including households with multiple Internet access devices.

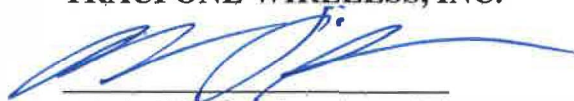
²⁴ The problem of the increasing minimum standards was addressed in detail in TracFone's petition for reconsideration of the Lifeline Modernization Order filed June 23, 2016, at 12. In that petition, TracFone described the results of its 2013-2014 Broadband Adoption Lifeline Pilot Project. The results of that project showed that two percent or less of low-income consumers were willing and able to pay even \$10 per month for broadband service. TracFone further explained that the Commission's formula for establishing a minimum mobile broadband standard starting in December 2019 would necessitate monthly charges to consumers of between \$70 and \$120 per month – far beyond the means of most Lifeline-eligible households.

CONCLUSION

For the reasons described in these comments, the Commission has abundant statutory authority and, indeed, a statutory responsibility to mandate support for broadband through the Lifeline programs funded by the Universal Service Fund. That responsibility includes the obligation to ensure that broadband service subsidized through the Lifeline program is affordable to those low-income households eligible for Lifeline-supported broadband service.

Respectfully submitted,

TRACFONE WIRELESS, INC.



Mitchell F. Brecher
GREENBERG TRAURIG, LLP
2101 L Street, NW, Suite 1000
Washington, DC 20037
(202) 331-3100

Its Attorneys

July 17, 2017